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SUPREME COURT, U. S.

No. 71-327

In the Supreme Court of the United States

OCTOBER TERM, 1971

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not reported. The opinions of the Federal Power Commission (Pet. App. A3–A13) are not yet officially reported.

JURISDICTION

The initial order of the court of appeals (Pet. App. A1 was entered on May 13, 1971, and a timely petition for rehearing was denied on June 21, 1971. The petition

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for a writ of certiorari was filed on September 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825l(b)).

QUESTION PRESENTED

Whether the Federal Power Commission properly concluded that a public utility subject to its jurisdiction is permitted under its contracts with certain customers to file unilateral rate increases.

STATUTES INVOLVED

The pertinent statutory provisions are set forth at Pet. App. A14–A17.

STATEMENT

Petitioners, eight rural electric cooperative customers of the Mississippi Power and Light Company ("Mississippi"), seek review of an order of the court of appeals upholding a Commission decision that Mississippi was entitled under its contracts with petitioners to file unilateral rate increases with the Commission. The applicable provision, common to all the contracts in question, reads (Pet. App. A6)):

> *Rate.* [The] [a]ssociation shall pay Company for electric power and energy furnished hereunder for its own use and for resale directly to ultimate consumers in accordance with Rate Schedule REA–10, attached hereto and made a part hereof.
>
> Service shall be taken and paid for under and in accordance with said rate schedule as provided above *or such other effective super-*

> *seding rate schedule as may be authorized by duly constituted regulatory authority.* Either party may seek authorization through regulatory procedures for such change as may be necessary to make any schedule used for billing just and reasonable. [Emphasis added.]

Acting pursuant to the provision, Mississippi filed with the Commission in November 1970 changes in its rates for sales to petitioners which would increase Mississippi's revenues from petitioners by more than 13 percent (Pet. App. A3–A4). Pursuant to the Commission's notice of the rate increase filing, petitioners protested the increase, alleging, *inter alia,* that the filing should be rejected since Mississippi's contracts with petitioners precluded unilateral rate increase filings (Pet. App. A4–A5).

The Commission rejected petitioner's contention and held that the contracts in question contemplated changes in the rates and charges specified and did not constitute fixed rate contracts (Pet. App. A6). Accordingly, Mississippi had the right to file unilateral rate increases (*ibid.*). At the same time, however, the Commission directed that a hearing be held on other issues raised by petitioners (Pet. App. A7–A8). The rate increases, after a one day suspension, were permitted to go into effect on the condition that Mississippi refund with interest any portion of the increased rates and charges ultimately found to be unjust (Pet. App. A8–A9). Petitioners' application for rehearing was denied (Pet. App. A11–A13).

The court of appeals (Pet. App. A1) dismissed petitioners' petition for review of the Commission's order,

relying on this Court's decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

ARGUMENT

The decision below is correct and is not in conflict with any decision of this Court or another court of appeals. As the case—involving only the proper interpretation of a contractual provision—is not of general importance, review by this Court is unwarranted.

1. The Commission properly rejected petitioners' argument that the rate contracts between Mississippi and petitioners did not permit Mississippi to increase its rates by filing changes with the Commission. Petitioners rely on *Federal Power Commission* v. *Sierra-Pacific Power Co.*, 350 U.S. 348, and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, which held that where contracts between utilities subject to the Commission's jurisdiction and their customers provide for fixed rates, the utilities cannot unilaterally file rate increases with the Commission. Those decisions, however, must be read in the light of the Court's subsequent decision in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, *supra*, involving a contractual provision establishing a rate in accordance with a natural gas pipeline company's rate schedule "*or any effective superseding rate schedules*, on file with the Federal Power Commission." 358 U.S. at 105. Distinguishing the *Mobil* case, this Court found that the quoted language effectively reserved the pipeline company's right to file unilateral rate increases in accordance with the applicable pro-

cedures specified in the Natural Gas Act, 15 U.S.C. 717, *et seq.*, 358 U.S. 109–115.

Petitioners attempt to distinguish *Memphis* on the ground that their contracts with Mississippi—which provided for specified rates or "such other effective superseding rate schedules as may be authorized by duly constituted regulatory authority" (see pp. 2–3, *supra*)—required the new rates to be "authorized" by the Commission, a term not included in the contracts under consideration in *Memphis*. Petitioners argue that no approval or other Commission action is necessary for a rate increase filed pursuant to Section 205 of the Federal Power Act (16 U.S.C. 824d) to become effective (Pet. 7–9, 11–12).

Petitioners erroneously equate (Pet. 10–12) Commission authorization with Commission approval of rate increase filings under Section 205 of the Act. As this Court has recognized in *Memphis,* 358 U.S. at 113, 114, when a rate filing is made, the Commission can either reject it, suspend its effective date for up to five months (in this case the new rates were suspended for one day) pending a hearing on the lawfulness of the new rates, or permit it to become effective at the end of the notice period. In view of this power, the Commission's regulations define the effective date of a new rate schedule as the date the schedule is "*permitted* by the Commission to become effective as a filed rate schedule." 18 C.F.R. 35.2(e), emphasis added. Thus, in a very real sense, the Commission "authorizes" the taking effect of new rate schedules, although Commission approval, in terms of

a decision on the lawfulness of the new rates if proceedings under Section 205(e) are instituted, may not follow for some time.

Petitioners argue (Pet. 11) that the "superseding rate schedules" referred to in their contracts with Mississippi are limited to schedules fixed by the Commission following a determination under Section 206(a) of the Act that the original schedules were "unjust, unreasonable, unduly discriminatory or preferential." Such an interpretation, however, would render the contractual provision entirely superfluous. As this Court noted in *Memphis,* in rejecting a similar argument, rate changes ordered by the Commission following a proceeding under Section 5(a) of the Natural Gas Act (similar to Section 206(a) of the Federal Power Act) are, as a matter of law, incorporated into all rate contracts. 358 U.S. at 115–116, n. 10.

2. Petitioners assert (Pet. 10, 12) that the decision below conflicts with other courts of appeals and Commission decisions that have denied the right to make unilateral rate changes. Since the contracts involved in those cases, however, did not contemplate unilateral rate changes, there is no conflict.

3. Petitioner's reliance (Pet. 13) on *Shell Oil Co.* v. *Federal Power Commission,* 334 F. 2d 1002 (C.A. 3) for the proposition that the Commission should have held a hearing to determine the meaning of the word "authorized" in the contracts is unfounded. In *Shell,* the determination whether the contract authorized an increase in rates depended upon whether the

rate charged in another contract was higher than the rate charged in the contract under consideration. To resolve the question, the Commission had to consider certain extrinsic factors to ascertain price comparability and a hearing was thus necessary. 334 F. 2d at 1007–1008. No comparable factual issue exists here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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